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In the Supreme Court of the United States

OCTOBER TERM, 1978

FREDERICK J. OTTERBEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN T. BANNON, JR.
Attorney
Department of Justice
Washington, D.C. 20530

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OPINION BELOW

The opinion of the court of appeals is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 1978. A petition for rehearing was denied on January 9, 1979. The petition for a writ of certiorari was filed on February 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was prejudiced by the testimony of an expert witness.

2. Whether there was sufficient evidence to support petitioner's conviction.

3. Whether 18 U.S.C. 664, which forbids conversion or embezzlement of funds of an employee pension benefit plan, is unconstitutionally vague.

4. Whether the trial court was required to poll the jury to determine whether any member had read a newspaper report of the trial.

5. Whether it was improper for the trial court to offer to answer questions about its instructions after the jury had deliberated for five hours without reaching a verdict.

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on eight counts of converting funds of an employee pension benefit plan, in violation of 18 U.S.C. 664. He was sentenced to one year's imprisonment and two years' probation. The court of appeals affirmed (Pet. App. 3-5).

The evidence at trial showed that petitioner, the controlling stockholder of Universal Enterprises, directed John Bevon, the company's general manager, to negotiate a collective bargaining agreement with Local 1422A of the International Longshoremen's Association (ILA) (Tr. 99, 188). After several meetings that petitioner attended, the company signed a collective bargaining agreement with Local 1422A (Tr. 101, 191-192, 203-205). By the express terms of that contract, the company agreed to participate in a comprehensive employee benefit plan that provided both pension and welfare benefits for its employees. The company also agreed to make quarterly contributions to the National ILA Pension Trust to fund those pension and welfare benefits.

Because all of the necessary trust documents were not yet available, the company agreed to deposit its contributions to the pension and welfare plan in an escrow account, where the funds would be kept until the National ILA Pension Trust called for them (Tr. 126-127, 179).[1] The escrow account was opened at the First Federal Savings and Loan Association in Charleston, South Carolina, and the company regularly deposited its contributions in the escrow account (Tr. 124, 200). Between September 1975 and July 1976, the company made 45 deposits, totalling $24,267, (Tr. 82-83). During each payroll period the money owed the pension and welfare plan was set aside and deposited in the account (Tr. 198).[2]

On July 29, 1976, petitioner asked the company's general manager, John Bevon, to make a withdrawal from the escrow account (Tr. 202).[3] Bevon refused to do so, warning petitioner that such action would be improper (*ibid.*). Petitioner then revoked Bevon's authority to make withdrawals from the escrow account and transferred that authority to himself (Tr. 79). After petitioner took control of the escrow account, he personally deposited five more checks. On each occasion, the accompanying voucher designated

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[1]The company's general manager, John Bevon, informed petitioner that it was necessary to physically segregate the funds belonging to the pension and welfare plan from the corporation's general funds (Tr. 198, 208-209).

[2]The deposit vouchers that accompanied the checks payable to the escrow account were clearly designated for the "welfare fund and pension fund" (Tr. 245-249).

[3]Universal's general manager was the only corporate officer authorized to make withdrawals from the escrow account.

the deposit as a pension and welfare fund contribution. Several of the checks were signed by petitioner (Tr. 251-262). Each such payment into the escrow account was recorded in the corporate ledger as a contribution to the pension and welfare fund (Gov. Ex. 357).[4]

Between July 30, 1976, and May 13, 1977, petitioner made eight withdrawals from the escrow account, totalling $31,500 (Tr. 81-82). Those withdrawals nearly depleted the $32,181 contained in the account (Gov. Exs. 225, 370). The money withdrawn from the escrow account was deposited by petitioner in the company's general corporate account in the Bank of North Charleston (Tr. 89-96, 251-262, 273-277).[5]

During an FBI interview in January 1977, petitioner stated that the escrow account was not a working capital account, but was "strictly for the health, welfare and pension funds" (Tr. 501). Petitioner stated that he established the account for contributions to the pension and welfare fund. When asked if all of the company's contributions to the pension fund were currently in the escrow account, petitioner replied that the pension fund money was owed to the union and was available upon request. In fact, the escrow account was nearly depleted and Universal did not possess sufficient cash reserves to replace the money withdrawn from the account (Tr. 501-505; Gov. Ex. 370). During a subsequent interview with the FBI, petitioner retracted parts of his earlier statement. He admitted

[4]Pursuant to the collective bargaining agreement, the company mailed weekly reports to Local 1422A, listing the amounts of pension and welfare funds that were paid into the escrow account (Tr. 109-110, 121-122).

[5]During this period, petitioner increased his ownership of the company from 51% to 70%. The new stock that petitioner caused the company to issue to himself had a par value of $31,500—precisely the amount taken from the escrow account (Tr. 463-475).

that the escrow account was in fact used for "working capital" and stated that the company's obligation to make contributions to the pension fund were unclear (Tr. 519-523).

ARGUMENT

1. Petitioner contends (Pet. 13-15) that it was plain error to allow an expert witness called by the government to testify that the escrow account was an employee pension benefit plan because the proper designation of the account presented a question of law for the court.

An official of the Department of Labor, called by the government as an expert witness, testified regarding the administration of the Employee Retirement Income Security Act of 1974 (ERISA) (Tr. 291-292). Responding to a hypothetical question, he stated his opinion that an escrow account having the characteristics of the account here involved would be an employee pension benefit plan within the meaning of ERISA (Tr. 314-320). Petitioner made no objection, agreeing that an expert witness could express an opinion as to whether the plan was covered by the statute (Tr. 292-294). Petitioner later called his own expert witness who testified that the escrow account was not an employee pension benefit plan covered by ERISA (Tr. 549-582), and contended that this was a question for the jury (Tr. 824).

Under these circumstances, petitioner is precluded from contending that the question was solely a question of law for the court. See Fed. R. Evid. 103(a)(1). Moreover, any error in admitting evidence on this subject inured to the benefit of petitioner. As the court of appeals pointed out (Pet. App. A4 n.*), the escrow account, as a matter of law, was covered by the statute.[6] Thus, if the question were treated solely

[6]Petitioner cites no authority suggesting that the escrow account was not an employee pension benefit plan covered by the statute.

as a question of law, as petitioner claims it should have been, the proper course would have been to instruct the jury that statutory coverage existed. Giving petitioner the opportunity to persuade the jury otherwise certainly did not prejudice him.

2. Petitioner further contends (Pet. 15-18) that without the testimony of the government's expert witness, there was insufficient evidence to sustain his conviction.

However, the evidence adduced at trial, wholly apart from the testimony of the expert witness, established that the funds in the escrow account were part of an employee pension benefit plan and that petitioner was fully aware of that fact. The statute (29 U.S.C. 1002(2)) defines an employee pension benefit plan to include

> any plan, fund, or program * * * to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program * * * provides retirement income to employees * * * reguardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

The evidence at trial established that the money in the escrow account was part of an employee pension benefit plan within this definition. The account was established by the company pursuant to a collective bargaining agreement, which called for contributions to fund employee retirement benefits. Petitioner was well aware of the purpose of the account and of the duty to disburse it to the ILA pension trust. The evidence also showed that petitioner was told by the company's general manager that it was necessary to segregate pension fund contributions from general corporate

assets (Tr. 204, 213-214). Moreover, the vouchers attached to the checks deposited in the account clearly designated the deposits as pension and welfare contributions (Tr. 251-252). In his first interview with the FBI, petitioner stated without hesitation that the escrow account contained funds segregated for welfare and pension benefits (Tr. 501-505). In sum, the evidence overwhelmingly established that the account was an employee pension benefit plan account within the meaning of the statute, and further showed that petitioner was aware of that fact.

3. Petitioner also argues (Pet. 18-21) that the statutory provisions under which he was convicted are void for vagueness.

The statute (18 U.S.C. 664) broadly forbids any person to embezzle or unlawfully and willfully abstract or convert to his own use or the use of another person any of the funds of any employee pension benefit plan, or of any fund connected with an employee pension benefit plan. As noted above, an employee pension benefit plan is defined to include any plan, fund or program "to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program * * * provides retirement income to employees" (29 U.S.C. 1002(2)).

This statute afforded petitioner fair notice that he was not at liberty to convert funds designated as employee pension funds for private use. Vagueness challenges not implicating First Amendment or related rights must "be examined in the light of the facts of the case at hand." *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975); *United States* v. *Powell*, 423 U.S. 87, 92-94 (1975). It is irrelevant that there may be difficulty in determining whether certain marginal cases are subject to the statute if the general coverage of the statute is clear and the defendant's conduct falls within

that coverage. See, *e.g.*, *United States* v. *Harriss*, 347 U.S. 612, 617 (1954); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963). Since the funds here involved were held in escrow for the sole purpose of providing retirement and welfare benefits for employees and since petitioner was clearly aware of that fact, he may not contend that the statute provided inadequate warning.[7]

4. Petitioner also argues (Pet. 21-24) that the district court erred in failing to poll the jury to determine whether any member had read a newspaper article that appeared during the course of the trial.

During the second day of trial, a former employee of the company testified that he had made inquiries about his pension rights. He also testified that he had been fired for leaving work early. At the conclusion of his testimony, the district court asked the witness whether he was fired before or after inquiring about the pension fund. The witness replied that he was fired after making the inquiry (Tr. 357). Petitioner did not object to the question or the answer.

The next day, defense counsel brought to the court's attention a newspaper article in the morning edition

[7] *Colautti* v. *Franklin*, No. 77-891 (Jan. 9, 1979), relied on by petitioner, has no relevance here. In that case, the Court determined that a statutory provision regulating abortions was unconstitutionally vague. The court pointed out that the statute permitted conviction of physicians "without regard to fault" and had the effect of chilling the constitutional right to receive abortions. Slip op. 14-17. In this case, in contrast, the statute does not chill the exercise of a constitutional right, and the district court specifically charged the jury that petitioner could not be convicted unless the government proved beyond a reasonable doubt that petitioner acted with fraudulent intent in taking the money (Tr. 806-807).

of *The State*, a Columbia, South Carolina newspaper.[8] The article reported that the witness had testified that he was fired as a result of his inquiries about the pension fund.[9]

Petitioner's counsel pointed out that the article was inaccurate because it stated that the witness had been fired shortly after inquiring about the pension fund when in fact he had been fired several months later (Tr. 363). The court asked defense counsel on four separate occasions what it should do to avoid any possible prejudice. Defense counsel offered no suggestions (Tr. 365, 369, 371, 372). The court also asked whether defense counsel sought an instruction to the jury to disregard the answer of the witness regarding his dismissal. In addition, the court asked counsel if he was seeking a mistrial (Tr. 371-372). Counsel did not seek either type of relief.

In these circumstances, the court below properly rejected petitioner's claim that the publication of the article required a reversal of his conviction. The article appeared only once, on the third day of a five-day trial and after the jury had been warned several times not to discuss, listen to, or read anything concerning the trial outside of the courtroom (Tr. 135, 136, 229, 446-448). There was nothing inflammatory about the article, and petitioner suggested no additional steps to avoid the possibility of prejudice. The failure of the trial court to poll the jury *sua sponte* was not reversible error. See, *e.g.*, *United States* v. *Taylor*, 569 F. 2d 448, 454 (7th Cir.), cert. denied, 435 U.S. 952 (1978);

[8] The article appears on pages 177a-178a of the appendix filed in the court of appeals. It was printed in "Section C" of the newspaper.

[9] The article also contained a background discussion of the trial, summarized the testimony of prior witnesses, and discussed certain theories of the prosecution and the defense.

United States v. *Jones*, 542 F. 2d 186, 194 (4th Cir. 1976); *Booton* v. *Hanauer*, 541 F. 2d 296, 298 (1st Cir. 1976); *United States* v. *Armocida*, 515 F. 2d 29, 48-49 (3d Cir. 1975).

5. Finally, petitioner contends (Pet. 24-27) that the district court erred by communicating with the members of the jury after they had deliberated without reaching a verdict.

After the jury had deliberated for five hours, the district court, in the presence of petitioner and his counsel, inquired if it could be of assistance with respect to any of the legal issues before them (Tr. 843). In response to the question of one juror, the court restated portions of the instructions that it previously had given without objection (Tr. 843-848). At that time, defense counsel did not object either to the question or the court's response. When the jury retired once again, the court asked petitioner's attorneys if they wished to take exception to anything the court had said. Both indicated that they had no objection (Tr. 851). While it may be preferable for the trial court to receive written rather than oral questions from the jury (1 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 18.13, at 603 (1977)), the district court's receipt of an oral question does not constitute reversible error, particularly where the defendant offers no objection to that procedure. *United States* v. *Dono*, 428 F. 2d 204, 209 (2d Cir.), cert. denied, 400 U.S. 829 (1970).[10]

[10]Petitioner's reliance on *Rogers* v. *United States*, 422 U.S. 35 (1975), is also misplaced. In *Rogers*, the Court disapproved a communication, between the trial judge and the jury that took place without the knowledge of the defendant or his attorney. In the present case, petitioner and his lawyer were present and had the opportunity to object to the district court's procedure.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOHN T. BANNON JR.
Attorney

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